

Journal of International and Comparative Law

Volume 3
Issue 2 *Volume 3, Spring 2013, Issue 2*

Article 6

March 2016

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Recommended Citation

Angelie Thomas (2013) "The Costs of Harmonization: The Embrace of an International Copyright Regime in Golan v. Holder," *Journal of International and Comparative Law*. Vol. 3 : Iss. 2 , Article 6.
Available at: <https://scholarship.law.stjohns.edu/jicl/vol3/iss2/6>

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**THE COSTS OF HARMONIZATION:
THE EMBRACE OF AN INTERNATIONAL COPYRIGHT
REGIME IN *GOLAN V. HOLDER***

*Angelie Thomas**

INTRODUCTION

A copyright creates exclusive rights to a literary and artistic work that is original.¹ Copyrights are territorial by nature:² there is no grant of copyright protection that extends worldwide.³ Nevertheless, an international copyright regime has developed, consisting of bilateral copyright treaties and multilateral copyright conventions that now protect the expression of ideas far beyond their country of origin.⁴

The first accord to shape the foundation of this international copyright regime was the 1886 Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”).⁵ Under the Berne Convention, nationals of a member country enjoy copyright protection beyond their nation’s

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¹ See PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE 4 (2d ed. 2010). These exclusive rights generally include the right to reproduce, distribute, publicly perform, broadcast, and otherwise communicate a work to the public, *id.*

² *Id.* at 97. Under the territoriality principle, copyright exists under the laws of individual countries and ends at their borders. This principle addresses two interests: national sovereignty and the promotion of international commerce by securing reasonable investment expectations, *id.* at 95.

³ See Jon Baumgarten, *Primer on the Principles of International Copyright*, in FOURTH ANNUAL U.S. COPYRIGHT OFFICE SPEAKS: CONTEMPORARY COPYRIGHT AND INTELLECTUAL PROPERTY ISSUES 470, 471 (1992) (arguing that the term “international copyright” is a misnomer because there is no existing single code governing copyright protection across national borders).

⁴ See Jane C. Ginsburg, *Ownership of Electronic Rights and the Private Int’l Law of Copyright*, 22 Colum.-VLA J.L. & Arts 165, 169 (1998) (describing the international copyright regime as a collection of copyrights by virtue of bilateral and multilateral treaties); see also Lynn Carino, Note, *Creative Technology, Ltd. v. Aztech System Pte, Ltd.: The Ninth Circuit Sends a United States Copyright Infringement Case to Singapore on a Motion of Forum Non Conveniens*, 41 VILL. L. REV. 325, 330 (1996).

⁵ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

borders.⁶ Article 18 of the Berne Convention requires countries to protect the works of other member States unless the works' copyright term has expired in the country where protection was claimed or the country of origin.⁷ The United States only joined the Convention in 1989, having formerly resisted the forces of international harmonization.⁸ Even after joining Berne, Congress adopted a minimalist approach to the copyright regime, making only those changes to American copyright law that were explicitly required under the treaty's provisions.⁹ It offered no protection to any foreign work that was in the public domain in the United States. Thus, while the United States declared its compliance with Berne, it never addressed or enacted legislation to implement Article 18 of the Convention.¹⁰

⁶ See *id.* at art. 1 (providing that the countries to which the Berne Convention applies "constitute a Union for the protection of the rights of authors in their literary and artistic works"); see also *id.* at art. 3 (stating that the protection of the Convention applies to "(a) authors who are nationals of one of the countries of the Union, for their works, whether published or not" and "(b) authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union").

⁷ See *id.* at art. 18. Article 18 establishes that the Berne Convention applies to "works which at the moment of its coming into force, ha[d] not yet fallen into the public domain in the country of origin through the expiry of the term of protection," *id.* Article 18 states further that "if... through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed," the work will not be protected, *id.*

⁸ See PAUL E. GELLER, *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* § 5 (2012); see also Edward L. Carter, *Harmonization of Copyright Law In Response To Technological Change: Lessons From Europe About Fair Use And Free Expression*, 30 U. LA VERNE L. REV. 312, 316 (2009).

⁹ See H.R. REP. NO. 100-609, at 52 (1988); see also Carter, *supra* note 8, at 316 (noting that under the Berne Convention the United States was required to recognize the moral rights of authors, but that the U.S. Congress skirted this requirement by only recognizing moral rights in a very limited way for certain visual artists).

¹⁰ See S. REP. NO. 103-412 at 225 (1994). The Berne Convention was generally viewed as being non-self-executing. It thus required domestic legislation to implement the treaty in the United States. By passing the 1988 Berne implementation amendments, Congress left no doubt of its view that the Berne Convention was not self-executing: the amendments provide that "any country party to this convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention," see PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* 15

In 1994, however, the backdrop changed. The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") mandated an implementation of the first twenty-one articles of the Berne Convention.¹¹ TRIPS enforced the harmonization effort by tying intellectual property protection to trade: nations that failed to comply with TRIPS would be subject to international trade sanctions.¹² In response to the TRIPS requirement, Congress enacted § 514 of the Uruguay Round Agreements Act (URAA), belatedly granting certain foreign works in the public domain the copyright protection that they would have enjoyed if the United States had fully complied with its obligations under the Berne Convention in 1989.¹³

Recently, in *Golan v. Holder*,¹⁴ the Supreme Court of the United States reviewed the constitutionality of the URAA § 514 enactment. Petitioners were orchestra conductors, musicians, and publishers who formerly had free access to works that § 514 removed from the public domain.¹⁵ They argued that the retroactive copyright restorations of the URAA violated the Constitution, exceeding Congressional authority under the Copyright Clause and transgressing First Amendment limitations.¹⁶

The Court, however, disagreed with the plaintiffs, and held that § 514 of the URAA neither contravened constitutional limitations placed on Congress nor deviated from First Amendment principles.¹⁷ It found that because § 514 merely

& n.19 (1st ed. 2001) (describing self-executing and non-self-executing treaties in the context of the Berne Convention).

¹¹ See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1197 (1994) (stating that "members shall comply with Articles 1 through 21 of the Berne Convention").

¹² See Carter, *supra* note 8, at 315.

¹³ See Uruguay Round Agreements Act, Pub. L. No. 103-465, sec. 514, § 104A, 108 Stat. 4809, 4976-81 (1994) (codified at 17 U.S.C. §§ 104A, 109(a) (2011)).

¹⁴ *Golan v. Holder*, 132 S. Ct. 873, 873 (2012).

¹⁵ *Id.* at 878. Prior to the URAA enactment, each petitioner utilized or performed works by foreign artists in the public domain. Lawrence Golan in particular performed and taught works by foreign composers including Dmitri Shostakovich and Igor Stravinsky, *see id.* Following the enactment, petitioners were either prevented from using these works or were required to pay higher licensing fees that were often cost-prohibitive. *See Golan v. Gonzalez*, 501 F.3d 1179, 1182 (10th Cir. Colo. 2007).

¹⁶ *See Golan*, 132 S. Ct. at 883.

¹⁷ *Id.* at 878.

continued the trend toward a harmonized copyright regime,¹⁸ and there was no reason to reject Congress's rational judgment that adherence to the Berne Convention would serve the objectives of the Copyright Clause.¹⁹ Congress had determined that U.S. interests were best served by full participation in the dominant system of international copyright protection.²⁰ The Court maintained that its obligation was not to determine whether this decision was wise, but whether it was constitutional.²¹

Though the Court was correct in limiting its decision to a constitutional analysis, *Golan* nevertheless affirms a harmonization of copyright that the United States had previously rejected for two centuries. The Court adopted a deferential approach to copyright legislation, such that challenges to the constitutionality of future expansions to copyright protection are unlikely to succeed.²² This comment will argue that the Court failed to consider the costs of moving toward an international copyright regime. Part A will discuss how such a regime can impoverish developing nations in their effort to comply with international copyright requirements that poorly support their local conditions. Part B will show how the international right to free expression can be abridged by a harmonized copyright system. Part C will suggest that diversification of copyright law may provide the better alternative.

I. The Costs of Harmonization to Developing Countries

The danger of creating a harmonized international copyright regime stems from the inherent distinctions between

¹⁸ *Id.* The Court explained that by fully implementing the Berne Convention, Congress ensured that both foreign and domestic works would be governed by the same legal regime, *id.* at 893 (noting that before the United States joined Berne, domestic works were protected under U.S. statutes and bilateral international agreements, while many foreign works were available royalty-free at an artificially low cost).

¹⁹ *Id.* (finding that the decision to implement URAA § 514 was well within the power of the political branches).

²⁰ *Id.* These interests included ensuring compliance with international obligations, securing greater protection for U.S. authors abroad, and remedying unequal treatment of foreign authors, *id.* at 894.

²¹ *Id.* (declaring that it was the Court's duty to determine whether the action Congress took exceeded any constitutional limitations).

²² See Mary LaFrance, Emerging Issues, *Supreme Court's Decision to Uphold the Constitutionality of Copyright Restoration: Golan v. Holder*, 2012 U.S. LEXIS 907, 2012 EMERGING ISSUES 6197 (Jan. 31, 2012).

developed nations and developing nations. The original Western intellectual property system became universal because of the economic and military support backing it, not because it embodied universal values.²³ Thus, a "one size fits all" copyright regime with a global application may not be appropriate.²⁴

The uniformity of copyright legislation in developing countries is evidenced by their use of text copied exactly from the treaty language of the Berne Convention, without the slight deviation seen in the copyright laws of most developed nations. This suggests that these laws were created without attention to the distinct cultural interests, informational constraints, and economic realities of each country.²⁵ An international copyright system that disregards these significant differences severely disadvantages developing nations and has various consequences in each country. Developing nations face cultural and educational barriers after the adoption of such programs. Furthermore, there are significant administrative costs involved in implementing the universal system.

A. The Inhibition of Cultural Progress

A nation's system of copyright embodies its priorities in establishing a unique cultural environment.²⁶ These priorities vary widely among countries with different social traditions.²⁷ The

²³ See Peter K. Yu, *Intellectual Property at a Crossroads: The Use of the Past in Intellectual Property Jurisprudence: Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 391 (2004).

²⁴ See *id.*

²⁵ See Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, UNCTAD - ICTSD Project on IPRs and Sustainable Development 30 (2006), <http://www.iprsonline.org/resources/docs/Okediji%20%20Copyright%20and%20ODC%20-%20Blue%2015.pdf> ("[T]he uniformity of the limitations and exceptions evident in the legislation of many developing countries suggests that most of these laws were modeled on the Berne Convention without particularized attention to unique social interests, institutional constraints and/or political realities of each country.").

²⁶ See Matt Jackson, *Harmony Or Discord? The Pressure Toward Conformity In International Copyright*, 43 IDEA 607, 640 (2003) (explaining how copyright law is an instrument of cultural and information policy).

²⁷ There are some nations, such as France and Germany, that place a heavier emphasis on the "moral rights" of authors, see Jackson, *supra* note 26, at 640. Other nations, like the United States, concentrate on the utilitarian objective of

priorities of developed nations are often centered around free market principles, individual rights, and the concept that profits are the appropriate reward for the labor applied to creative endeavors.²⁸ Such beliefs result in laws that provide strong copyright protection. By contrast, nations built on foundations of Confucianism, Buddhism, and Islam are more communally oriented.²⁹ These beliefs indicate that knowledge and wealth should be shared within society and distributed equally,³⁰ suggesting the creation of copyright laws with limitations and exceptions for the public interest. By mandating the adoption of a universal system representing solely the priorities of developed nations, less-developed countries are deprived of the ability to tailor their copyright system to local beliefs.³¹

Countries with growing entertainment industries often stand to suffer most from an ill-fitting international copyright system. Senegal, for example, seeks to develop a music industry to diversify its economic base and strengthen the cultural solidarity of the country, looking to the city of Nashville for inspiration.³² Lebanon has an entertainment industry ready to explode onto the international arena.³³ In such countries, certain genres of works and modes of expression purposely incorporate, reproduce, or transform pre-existing works.³⁴ Facilitating access to protected works becomes vital to promoting ongoing creative activity, progress and growth.³⁵ A harmonized copyright regime blocks

promoting the production of creative works, *id.* (asserting that these differences contribute to a richer diversity of cultural products).

²⁸ See *id.* at 641 (citing Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 740 (2001)).

²⁹ See *id.* at 641–42 (citing Richard E. Vaughan, *Defining Terms in Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When They Say “Property”?* A Lockean, Confucian, and Islamic Comparison, 2 ILSA J. INT’L. & COMP. L. 307, 321 (1996)).

³⁰ See *id.* at 641.

³¹ See Peter K. Yu, *International Lawmaking In The New Millennium: An Introduction*, 10 CARDOZO J. INT’L & COMP. L. 1, 3 (2002).

³² See Lauren Loew, Note, *Creative Industries in Developing Countries and Intellectual Property Protection*, 9 VAND. J ENT. & TECH L. 171, 173 (2006).

³³ See *id.*

³⁴ See Okediji, *supra* note 25, at x. Modern examples include the practice of “sampling” in the music industry, narrative styles in literature and creative writing, and programming software for interoperability, *id.*

³⁵ See *id.* at x–xi.

access to these works and thus inhibits cultural progress that free access would otherwise encourage.

B. A Barrier to Information and Educational Access

The harmonization of copyright law can result in the loss of national autonomy, as it not only prevents nations from pursuing their own domestic cultural agendas,³⁶ but also sacrifices diverse perspectives on the role of information in society.³⁷ This is particularly the case in developing countries' access to educational materials.

The materials most often affected by copyright in these countries are textbooks, journals, course packs and information that can be found in libraries.³⁸ Copyright holders control the photocopying, reprinting, distributing of such materials.³⁹ They also have the right to prohibit parallel importation of educational materials from cheaper sources.⁴⁰ For example, foreign publishers supplying the book market in Thailand prohibit parallel importation of cheaper books from China or India.⁴¹ Books in Thailand also cannot be exported to other nations.⁴² In South Africa, medical personnel who wish to distribute copyrighted material about HIV/ AIDS to students and patients are required to pay royalty fees, thereby severely restricting the circulation of such information.⁴³ Restrictions on making copies of protected material and the high costs of royalties for reproducing this material—consequences that result from an increasingly harmonized

³⁶ See Jackson, *supra* note 26, at 640.

³⁷ See *id.* at 643 (describing the consequences of harmonization of copyright laws).

³⁸ See SUSAN STRBA, INTERNATIONAL COPYRIGHT LAW AND ACCESS TO EDUCATION IN DEVELOPING COUNTRIES 29 (2012) (explaining the extensive rights of the copyright holders in developed countries).

³⁹ See *id.* (noting also that publishers do not often grant licenses to reprint their books).

⁴⁰ See *id.*; see also Annual Meeting of the International Association for the Advancement of Teaching and Research in Intellectual Property, July 7–9, 1999, *Parallel Imports and International Trade* at 1, ATRIP/GVA/99/6 (explaining that the term “parallel importation” refers to goods produced and sold legally, and subsequently exported).

⁴¹ See STRBA, *supra* note 38, at 29.

⁴² *Id.*

⁴³ *Id.* at 30.

copyright regime—thus affect the educational goals of developing countries.⁴⁴

C. Administrative Costs of Compliance

In addition, harmonization increases the financial burden on developing nations, as they must bear the administrative cost of compliance.⁴⁵ Developing countries are most often users, not producers, of copyrighted materials; as a result, they import a majority of their publications. These imported books are more expensive than locally reproduced books.⁴⁶ Furthermore, the materials in these works are reprinted or adapted from publishers in industrialized countries. The administrative costs involved in obtaining permission from these rights owners, who are mainly multinational companies from developed countries, are high.⁴⁷ For example, in Thailand, between 10% and 60% of the price of a book can be the result of copyright protection alone.⁴⁸ This increase in cost serves as a prohibitive barrier to the general population, where an average income household may pay up to 6% of its monthly income for just one textbook.⁴⁹ Thus, the harmonization of international copyright severely curtails the ability of developing nations to cope with the price of a universal system.

II. The Effects of Harmonization on the International Right to Free Expression

In *Golan v. Holder*, the Court scrutinized URAA § 514 under domestic freedom of speech principles.⁵⁰ However, the Court's decision affects (or extends to) international principles of freedom of expression.

The international principle of freedom of expression is set forth in the Universal Declaration of Human Rights.⁵¹ Through its

⁴⁴ *Id.*

⁴⁵ See Peter K. Yu, *TRIPS and its Achilles' Heel*, 18 J. INTELL. PROP. L. 479, 488 (2011).

⁴⁶ See STRBA, *supra* note 38, at 30–31.

⁴⁷ See *id.* at 30.

⁴⁸ *Id.* at 31.

⁴⁹ *Id.* at 30–31.

⁵⁰ See *Golan*, 132 S. Ct. at 890.

⁵¹ See G.A. Res. 217 art. III, U.N. Doc. A/810, art. 19, at 71 (1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom

appearance in various successive treaties, the principle has become a fundamental precept of customary international law.⁵² Entwined in this principle is the concept that free speech is often best served by the literal copying of existing expression.⁵³ Effective criticism, parody, artistic expression, and news reporting often gain considerable force by their literal reference to existing work.⁵⁴

Copyright law qualifies the free speech principle that a speaker is entitled to choose how he communicates an idea, by proscribing the use of language and other material employed by a rightsholder.⁵⁵ This effectively places a tax on the flow of information. Therefore, an overly broad set of copyright owner rights can constrain public access to existing expression and hinder creative reformulations of that expression, thereby infringing upon the international right to free expression.⁵⁶

The international right to free expression encourages limitations of copyright in order to promote the free flow of

to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"). The principle of freedom of expression is also set forth in the International Covenant on Civil and Political Rights (ICCPR). *See* International Convention on Civil and Political Rights, adopted Dec. 16, 1966, art. 19(2), 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976).

⁵² *See* Neil W. Netanel, *The Digital Agenda of the World Intellectual Property Organization: Comment: The Next Round: The Impact Of The WIPO Copyright Treaty On TRIPS Dispute Settlement*, 37 VA. J. INT'L L. 441, 476 (1997); *see also* Thomas M. Franck, Note, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 61–62 (1992) (noting that the overwhelming support behind the Universal Declaration of Human Rights and the prestige accrued to it in succeeding years has made it a customary rule of state obligation).

⁵³ *See* Neil W. Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 299 (1998).

⁵⁴ *See id.* (suggesting that literal copying is often more effective than the mere reformulation of ideas or information). Copying is also a cheaper method of conveying ideas or information than the process of creating a whole new work, *see id.* Copying expression is thus highly conducive to making information available to those who might not otherwise afford access, a particular concern in developing countries, *see id.*

⁵⁵ *See* COPYRIGHT AND FREE SPEECH 24 (Jonathan Griffiths & Uma Suthersanen, eds., 2005 (discussing how freedom of speech concerns the form of speech as well as its contents)).

⁵⁶ *See* Netanel, *supra* note 52, at 476 (suggesting that while some degree of copyright protection provides important incentive for the dissemination of creative expression, an overly maximist reading of the copyright provisions of TRIPS can hinder that same dissemination).

information.⁵⁷ As expanded copyright gradually eliminates these restrictions, the *Golan* Court's embrace of a harmonized international copyright system will likely have a global effect on transformative uses of protected works.⁵⁸

III. Considering the Alternative of Diversification

A universal copyright system can certainly seem appealing: it promotes efficiency, reduces negotiation costs, and enhances international stability.⁵⁹ However, as the costs of harmonization far outweigh these benefits and the consequences of a universal international copyright regime suggest that diversification may provide the better solution.

Diversification of copyright laws would allow countries to develop protections that are commensurate with their particular needs and differences, instead of applying a "one size fits all" solution that creates friction with local conditions.⁶⁰ Additionally, as diversification facilitates jurisdictional competition that safeguards against governmental inefficiency and abuse, and makes copyright laws more accountable to local populations.⁶¹

Tailoring copyright laws appropriately will require research on nations' domestic industries and analyses by experts of how best to maximize a country's potential.⁶² It will require recognition of the underlying differences between nations. For countries like India or China, with stronger technological capacity, the needs will be different than a country in sub-Saharan Africa.⁶³

⁵⁷ *See id.*

⁵⁸ *See* Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 296 (1996).

⁵⁹ *See* Yu, *supra* note 23, at 382–83.

⁶⁰ *See id.* at 383.

⁶¹ *See id.*

⁶² *See* COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 105 (2002) (U.K.), *available at* <http://www.iprcommission.org/papers/pdfs/finalreport/CIPRfullfinal.pdf> (stating that the implementation of international copyright standards in the developing world must be undertaken with a proper appreciation of their crucial importance for social and economic development); *see also* Loew, *supra* note 32, at 197.

⁶³ *See* COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY, *supra* note 62, at 104 (indicating that different measures may be more or less important in

For those developing countries that have acquired significant technological and innovative capabilities, a system of weaker forms of copyright protection is necessary in the formative period of their economic development.⁶⁴ This is only possible if these countries are not forced to comply with an international system that provides much stronger copyright protection.

CONCLUSION

While many of the limitations and exceptions in copyright law are explicitly addressed through legislation, the actual substance and scope of the copyright system is often determined by courts in the course of adjudication.⁶⁵ Thus, the Court's deference to a harmonized international copyright regime in *Golan v. Holder*, and its failure to consider the international costs may have a broader impact than the Court realized. The effect of harmonization on the legal systems of developing nations, and on international principles of freedom of expression, may ultimately affect the international copyright regime's ability to sustain itself in the long term.

meeting the specific needs in individual countries); *see also* Loew, *supra* note 32, at 197.

⁶⁴ *See* COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY, *supra* note 62, at 1.

⁶⁵ OKEDIJI, *supra* note 25, at 20.